

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MYRON GIBBS,	§	
	§	No. 604, 2010
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0911008893
Appellee.	§	

Submitted: May 24, 2011
Decided: August 3, 2011

Before **HOLLAND, BERGER and JACOBS**, Justices.

O R D E R

This 3rd day of August 2011, upon careful consideration of the appellant's brief pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response, it appears to the Court that:

(1) On July 7, 2010, after a five-day trial, a Superior Court jury convicted the appellant, Myron Gibbs, of Rape in the Second Degree (as a lesser included offense of Rape in the First Degree), Rape in the Fourth Degree and Offensive Touching. Gibbs was acquitted of Kidnapping in the Second Degree. On September 17, 2010, after a presentence investigation, Gibbs was sentenced to a total of twenty years at Level V suspended after fifteen years for thirty months at

Level IV suspended after six months for a period of probation. This is Gibbs' direct appeal.

(2) By Order dated February 7, 2011, having received Gibbs' written request to proceed *pro se* on appeal, the Court remanded this case to the Superior Court for an evidentiary hearing.¹ By order dated February 16, 2011, the Superior Court reported that after a "lengthy colloquy" with Gibbs at a February 16 evidentiary hearing, Gibbs "decided to withdraw his request" to proceed *pro se* on appeal and continue with representation by counsel.

(3) On May 6, 2011, Gibbs' appellate counsel, (hereinafter "Counsel"),² filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c) ("Rule 26(c)") asserting that there are no arguably appealable issues.³ Gibbs, through Counsel, has submitted several claims for the Court's consideration.⁴

(4) Fairly summarized, Gibbs' claims on appeal are: ineffective assistance of trial counsel; ineffective assistance of appellate counsel; Superior Court error in failing to consider Gibbs' *pro se* pretrial motions; and Superior Court error when denying Gibbs' oral request at trial to dismiss trial counsel.⁵ The State has

¹ See Del. Supr. Ct. R. 26(d)(iii) (governing waiver of counsel).

² Gibbs was represented by different counsel at trial.

³ See Del. Supr. Ct. R. 26(c) (governing criminal appeals without merit).

⁴ *Id.*

⁵ It appears that in addition to two motions to dismiss counsel, Gibbs filed a speedy trial motion and a motion to suppress.

responded to Gibbs' claims and has requested that the judgment of the Superior Court be affirmed.

(5) Gibbs claims that the Superior Court erred when forwarding his *pro se* pretrial motions to trial counsel for appropriate disposition and when denying his oral request to dismiss counsel on the second day of trial. Both claims are without merit. It appears that Gibbs' *pro se* motions were referred to his trial counsel pursuant to Superior Court Criminal Rule 47.⁶ Gibbs has not demonstrated that such action was error. It further appears that the Superior Court considered Gibbs' oral request at trial for new counsel and,⁷ when appropriately denying the request for lack of good cause,⁸ accurately informed Gibbs of his two options: to proceed with court-appointed counsel or to proceed *pro se*.⁹

(6) It is well-settled that this Court will not entertain an ineffective assistance of counsel claim that is raised for the first time on direct appeal.¹⁰ In this case, because Gibbs' claim of ineffective assistance of trial counsel was not considered by the Superior Court, we decline to consider it in this appeal. For the same reason, we also conclude that Gibbs' claim of ineffective assistance of

⁶ See Del. Super. Ct. Crim. R. 47 (providing that the court will not consider *pro se* applications by defendants who are represented by counsel unless the defendant has been granted permission to participate with counsel in the defense).

⁷ Trial tr. at 10-16 (June 30, 2010).

⁸ Whether or not to appoint new counsel is within the discretion of the trial court. *Bultron v. State*, 897 A.2d 758, 763 (Del. 2006).

⁹ *Id.*

¹⁰ *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986).

appellate counsel is without merit. In the absence of the Superior Court's consideration of a claim of ineffective assistance of trial counsel in the first instance, Counsel was not ineffective when forgoing an ineffective assistance of trial counsel claim on appeal.

(7) When reviewing a motion to withdraw and an accompanying brief under Rule 26(c), the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims by conducting its own review of the record to determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹¹ In Gibbs' case, having conducted an independent review of the record, we are satisfied that Counsel made a conscientious effort to examine the record and the law and properly determined that Gibbs could not raise a meritorious claim on appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Carolyn Berger
Justice

¹¹ *Penon v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).